Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Appendix A (Opinion of the Ninth Circuit Court of Appeals, Sept. 13, 1999)	1a
Appendix B (Order of the United States District Court for the Northern District of California, July 17, 2000)	12a
Appendix C (Amended Preliminary Injunction Order of the United States District Court for the Northern District of California, July 17, 2000)	15a
Appendix D (Order in Case No. 98-00088 of the United States District Court for the Northern District of California, Oct. 16, 1998)	18a
Appendix E (Memorandum and Order re: Motions in Limine and Order to Show Cause in Case No. 98-00088 of the United States District Court for the Northern District of California, Oct. 13, 1998)	20a
Appendix F (Preliminary Injunction Order of the United States District Court for the Northern District of California, May 19, 1998)	39a
Appendix G (Memorandum and Order of the United States District Court for the Northern District of California, May 13, 1998)	41a
Appendix H (Order of the Ninth Circuit Court of Appeals denying rehearing and rehearing en banc, Feb. 29, 2000)	82a
Appendix I (Statutory provisions)	83a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16950, 98-17044 and 98-17137

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE;
JEFFREY JONES, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
For the Northern District of California

[Argued and Submitted: April 13, 1999
Decided: Sept. 13, 1999]

Before: SCHROEDER, REINHARDT and SILVERMAN, Circuit Judges.

PER CURIAM:

This interlocutory appeal involves a preliminary injunction entered at the United States' request, to stop the distribution of cannabis in the wake of California's initiative supporting the medical use of marijuana. The district court held that the distribution of marijuana by certain cannabis clubs and their agents, including appellant, Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (collectively "OCBC"), likely violates the

Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Controlled Substances Act"), 21 U.S.C. § 841(a)(1). *See United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1105 (N.D. Cal. 1998). The district court also indicated that it would consider in subsequent contempt proceedings a defense that a particular distribution was justified by a medical necessity. *Id.* at 1102. OCBC did not appeal the district court's order enjoining the distribution of marijuana by cannabis clubs. Instead, OCBC seeks to appeal three subsequent orders: (a) an order denying OCBC's motion to dismiss the complaint on the ground that an Oakland City ordinance makes it immune from liability under 21 U.S.C. § 885(d); (b) an order subsequently purged and vacated that found OCBC in contempt of the injunction; and (c) an order denying OCBC's motion to modify the injunction to permit cannabis distribution to persons having a doctor's certificate that marijuana is a medical necessity for them.

We lack jurisdiction over the appeal from the denial of the motion to dismiss and from the contempt order that has been purged. We have jurisdiction over the appeal from the denial of the motion to modify. We do not vacate the injunction, but remand for the district court to consider modifying the order.

Denial of the Motion to Dismiss

The district court denied the defendants' motion to dismiss that was grounded in the Oakland City Council's attempt to immunize OCBC under the Controlled Substances Act. The district court held that section 885(d) of the Controlled Substances Act is intended to protect state law enforcement officials when they en-

gage in undercover drug operations, and these defendants do not engage in such activities.

We lack jurisdiction of the appeal because the denial of a motion to dismiss is generally not appealable. *See* 28 U.S.C. §§ 1291 & 1292 (granting appellate jurisdiction over final orders and limited interlocutory orders). The denial of the motion to dismiss is not one of the interlocutory orders that can be appealed under § 1292, and it is not a final judgment under § 1291. *See, e.g., Credit Suisse v. United States Dist. Ct.*, 130 F.3d 1342, 1345-46 (9th Cir. 1997).

OCBC contends we have jurisdiction under 28 U.S.C. § 1292(a)(1) authorizing, *inter alia*, appellate jurisdiction over an interlocutory order "continuing . . . or refusing to dissolve or modify injunctions." OCBC asks us to treat the district court's denial of the motion to dismiss as, in effect, a continuance of the injunction and a refusal to dissolve it. OCBC relies upon *Jung Hyun Sook v. Great Pacific Shipping Co.*, 632 F.2d 100, 102 n. 4 (9th Cir. 1980).

The motion to dismiss in *Jung Hyun Sook*, however, was not a motion to dismiss the action in its entirety, but a motion intended specifically to dissolve an injunction. There the district court had enjoined the further prosecution of a Jones Act suit pending the determination of a petition to limit liability. *Id.* at 102. The district court's denial of the motion to dismiss the limitation of liability petition was appealable because its denial continued in effect the injunction against further prosecution of the Jones Act suit. The purpose of the motion to dismiss in that case was not to decide the merits of the litigation, but only to dissolve the injunction. *See* 16 Wright, Miller & Cooper, *Federal Practice*

and Procedure, § 3924.2, at 198-99 n.6 (2d ed. 1996). The motion to dismiss in this case was intended to resolve the entire dispute on the merits. While one effect of granting OCBC's motion to dismiss in this case would have been to dissolve the preliminary injunction, the broader purpose was to resolve the case in defendants' favor. The general rule barring appeals from the denial of motions to dismiss, therefore, must apply. *See Credit Suisse*, 130 F.3d at 1345-46 ("The district court's denial of [defendants'] motion to dismiss is not a 'final decision' within the meaning of 28 U.S.C. § 1291, and it is therefore not immediately reviewable.").

Nor did the district court's denial of the motion to dismiss constitute an order "continuing" the injunction within the meaning of 28 U.S.C. § 1292(a)(1). An order that "continues" an injunction under that statute is an order that extends the duration of the injunction that would otherwise have dissolved by its own terms. *See* 16 Wright, Miller & Cooper, *supra*, at 196; *see also Public Serv. Co. of Colorado v. Batt*, 67 F.3d 234, 236-37 (9th Cir. 1995); *In re Fugazy Express, Inc.*, 982 F.2d 769, 777 (2d Cir. 1992).

OCBC also argues that the denial of the motion to dismiss is appealable as a "collateral order" under the theory of the Supreme Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985). *Mitchell* permits appeal from orders denying immunity from suit to government officials on damage claims for violations of federal rights. Such orders are immediately reviewable because the immunity at stake is not merely an immunity from liability but an "immunity from suit" that is effectively lost if a case goes to trial. *See id.* at 526, 105 S. Ct. 2806. Section 885(d) is

not such an immunity from suit, but is on its face simply an immunity from liability. It provides that "no civil or criminal liability will be imposed" upon law enforcement officers who engage in drug activity as part of their duties. 21 U.S.C. § 885(d). Thus, OCBC can obtain effective review of its liability (or immunity) under the Controlled Substances Act after the district court has rendered a final judgment.

In addition, the order being appealed is not a "collateral order" involving an important issue separate from the merits of the lawsuit. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949). The merits of the government's suit depend squarely upon whether or not OCBC is immune from liability under § 885(d).

The Contempt Order

OCBC appeals the district court's order finding it in contempt and modifying the preliminary injunction so as to empower the U.S. Marshal to seize OCBC's offices. The court neither fined nor jailed members of OCBC as a result of the contempt. The district court subsequently vacated this modification to the injunction on October 30, 1998 after OCBC told the court that it would comply with the injunction. Consequently, OCBC was permitted to re-enter its offices.

The government argues that this appeal is moot because the modification order was vacated and the contempt purged. "A long line of precedent holds that once a civil contempt order is purged, no live case or controversy remains for adjudication." *Thomassen v. United States*, 835 F.2d 727, 731 (9th Cir. 1987); *accord In re Campbell*, 628 F.2d 1260, 1261 (9th Cir. 1980).

However, a party asserting that an issue is moot must demonstrate that there is no reasonable expectation that the violation will recur. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L.Ed.2d 642 (1979); *Campbell*, 628 F.2d at 1261.

This court has held that a purged contempt order is moot unless there is "near certainty" that the violation will recur. *Campbell*, 628 F.2d at 1262. That is not the case here. In its reply brief, OCBC reiterates that it has promised the district court that it will comply with the injunction. The only way for the violation to recur is if OCBC breaks its promise. Clearly, it is not a "near certainty" that OCBC will do so. Moreover, although the purged contempt order at issue in *Campbell* was not moot, the court explicitly limited its result to the facts of that case: "We emphasize that were it not for the statement of the grand jury foreman [informing the witness that he would be required to testify again in the future], we would be inclined to find that the purging of the contempt orders mooted the present appeals." *Id.* at 1261.

OCBC also contends that the appeal of the contempt order is not moot because it is "capable of repetition, yet evading review." An issue may evade review because of an inherent limit in the duration of a challenged action that prevents full litigation before it ends. *See Phoenix Newspapers, Inc. v. United States Dist. Ct.*, 156 F.3d 940, 945 (9th Cir. 1998). However, nothing inherently limited the duration of OCBC's contempt other than its own decision to purge. The appeal is now moot because OCBC voluntarily purged the contempt by declaring that it would comply with the injunction. Had OCBC chosen to remain in contempt to this day,

the appeal would not be moot because this court could have provided a remedy.

OCBC argues that even if the denial of the motion to dismiss and the modification order are not in and of themselves appealable, the court should assert pendent appellate jurisdiction because they are "inextricably intertwined" with the denial of the motion to modify the injunction, which is appealable. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L.Ed.2d 60 (1995). We have held that the "inextricably intertwined" doctrine should be narrowly construed; more is required than that separate issues rest on common facts. *See California v. Campbell*, 138 F.3d 772, 778 (9th Cir.), *cert. denied*, 525 U.S. 822, 119 S. Ct. 64, 142 L.Ed.2d 51 (1998). The legal theories on which the motion to dismiss, the contempt order, and the motion to modify are independent of each other. Each required application of different legal principles. They are not therefore so "intertwined" as to necessitate simultaneous review.

Denial of the Motion to Modify

OCBC contends that the district court abused its discretion by refusing to modify its injunction to permit cannabis distribution to patients for whom it is a medical necessity. A few days after the district court issued its contempt citation instructing the Marshals to padlock its premises, OCBC asked the district judge to modify the injunction to allow continuing cannabis distribution to patients whose physicians certify that (1) the patient suffers from a serious medical condition; (2) if the patient does not have access to cannabis, the patient will suffer imminent harm; (3) cannabis is necessary for the treatment of the patient's medical con-

dition or cannabis will alleviate the medical condition or symptoms associated with it; (4) there is no legal alternative to cannabis for the effective treatment of the patient's medical condition because the patient has tried other legal alternatives to cannabis and has found them ineffective in treating his or her condition or has found that such alternatives result in intolerable side effects. These factors were modeled on this court's recognition of a necessity defense to violations of federal law in *United States v. Aguilar*, 883 F.2d 662, 692 (9th Cir. 1989).

The denial of a motion to modify an injunction is independently appealable under § 1292(a)(1) as one of the appealable interlocutory orders denominated in that section. Therefore, we have jurisdiction to review the order denying OCBC's motion for modification.

The district court summarily denied OCBC's motion, saying that it lacked the power to make the requested modification because "its equitable powers do not permit it to ignore federal law." In doing so, the district court misapprehended the issue. The court was not being asked to ignore the law. It was being asked to take into account a legally cognizable defense that likely would pertain in the circumstances.

The government did not need to get an injunction to enforce the federal marijuana laws. If it wanted to, it could have proceeded in the usual way, by arresting and prosecuting those it believed had committed a crime. Had the government proceeded in that fashion, the defendants would have been able to litigate their necessity defense under *Aguilar* in due course. However, since the government chose to deal with potential violations on an anticipatory basis instead of prosecut-

ing them afterward, the government invited an inquiry into whether the injunction should *also* anticipate likely exceptions. This gives rise to a drafting issue—crafting an injunction that is broad enough to prohibit illegal conduct, but narrow enough to exclude conduct that likely would be legally privileged or justified.

In *Northern Cheyenne Tribe v. Hodel*, we held that courts retain broad equitable discretion when it comes to injunctions against violations of federal statutes unless Congress has clearly and explicitly demonstrated that it has balanced the equities and mandated an injunction. 851 F.2d 1152, 1156 (9th Cir. 1988). Here, although the government may be entitled to its requested injunction, there is no evidence that Congress intended to divest the district court of its broad equitable discretion to formulate appropriate relief when and if injunctions are sought. Further, there is no indication that the "underlying substantive policy" of the Act mandates a limitation on the district court's equitable powers. *Id.* at 1156.

The district court erred in another respect as well. In deciding whether to issue an injunction in which the public interest would be affected, or whether to modify such an injunction once issued, a district court must expressly consider the public interest on the record. The failure to do so constitutes an abuse of discretion. *Northern Cheyenne Tribe*, 851 F.2d at 1156; *American Motorcyclist Association v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983); *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 678 (9th Cir. 1988). OCBC has identified a strong public interest in the availability of a doctor-prescribed treatment that would help ameliorate the

condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses. Indeed, the City of Oakland has declared a public health emergency in response to the district court's refusal to grant the modification under appeal here. Materials submitted in support of OCBC's motion to modify the injunction show that the proposed amendment to the injunction clearly related to a matter affecting the public interest. Because the district court believed that it had no discretion to issue an injunction that was more limited in scope than the Controlled Substances Act itself, it summarily denied the requested modification without weighing or considering the public interest.

We have no doubt that the district court could have modified its injunction, had it determined to do so in the exercise of its equitable discretion. The evidence in the record is sufficient to justify the requested modification. OCBC submitted the declarations of many seriously ill individuals and their doctors who, despite their very real fears of criminal prosecution, came forward and attested to the need for cannabis in order to treat the debilitating and life threatening conditions.

In short, OCBC presented evidence that there is a class of people with serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; who will suffer serious harm if they are denied cannabis; and for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.

The government, by contrast, has yet to identify any interest it may have in blocking the distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes. It has offered *no* evidence to rebut OCBC's evidence that cannabis is the only effective treatment for a large group of seriously ill individuals, and it confirmed at oral argument that it sees no need to offer any. It simply rests on the erroneous argument that the district judge was compelled as a matter of law to issue an injunction that is coextensive with the facial scope of the statute.

The district court, accepting the government's argument that it lacked the authority to grant the requested modification, failed to undertake the required analysis and summarily denied OCBC's request. Accordingly, we reverse the order denying the modification and remand. On remand, the district court is instructed to reconsider the appellants' request for a modification that would exempt from the injunction distribution to seriously ill individuals who need cannabis for medical purposes. In particular, the district court is instructed to consider, in light of our decision in *United States v. Aguilar*, 883 F.2d 662, 692 (9th Cir. 1989), the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order.

The panel will retain jurisdiction over any further appeals in this case.

The case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-00088 CRB

UNITED STATES OF AMERICA, PLAINTIFF

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE, ET AL.,
DEFENDANTS

[Filed: July 17, 2000]

ORDER

Now before the Court is defendants' motion to modify the injunction issued on May 19, 1998, or in the alternative, to dissolve the injunction. After carefully considering the papers filed by the parties, and having had the benefit of oral argument, the motion to modify the injunction is GRANTED.

In *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999), the Ninth Circuit reversed the Court's order denying defendants' motion to modify the injunction and instructed the Court "to reconsider the [defendants'] request for a modification that would exempt from the injunction distribution to seriously ill individuals who need cannabis for medical purposes." *Id.* at 1115. In doing so, the court held that this Court must consider the public interest, and that

the evidence in the record "show[s] that the proposed amendment to the injunction clearly related to a matter affecting the public interest." *Id.* at 1114. Significantly, the Ninth Circuit also held that the government had not "identif[ied] any interest it may have in blocking the distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes." *Id.* The court noted that the government "has offered *no* evidence to rebut OCBC's evidence that cannabis is the only effective treatment for a large group of seriously ill individuals." *Id.*

On remand the government has still not offered any evidence to rebut defendants' evidence that cannabis is medically necessary for a group of seriously ill individuals. Instead, the government continues to press arguments which the Ninth Circuit rejected, including the argument that the Court must find that enjoining the distribution of cannabis to seriously ill individuals is in the public interest because Congress has prohibited such conduct in favor of the administrative process regulating the approval and distribution of drugs. As a result of the government's failure to offer any new evidence in opposition to defendants' motion, and in light of the Ninth Circuit's opinion, the Court must conclude that modifying the injunction as requested is in the public interest and exercise its equitable discretion to do so.

Accordingly, the injunction issued on May 19, 1998 will be modified as follows:

> The foregoing injunction does not apply to the distribution of cannabis by the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones to patient-members who (1) suffer from a serious medical

condition, (2) will suffer imminent harm if the patient-member does not have access to cannabis, (3) need cannabis for the treatment of the patient-member's medical condition, or need cannabis to alleviate the medical condition or symptoms associated with the medical condition, and (4) have no reasonable legal alternative to cannabis for the effective treatment or alleviation of the patient-member's legal medical condition or symptoms associated with the medical condition because the patient-member has tried all other legal alternatives to cannabis and the alternatives have been ineffective in treating or alleviating the patient-member's medical condition or symptoms associated with the medical condition, or the alternatives result in side effects which the patient-member cannot reasonably tolerate.

The Court DENIES defendants' motion to dissolve the injunction. Nothing in the Ninth Circuit's decision suggests that the Court should dissolve the injunction, especially in light of the above modification.

IT IS SO ORDERED.

Dated: July 17, 2000

/s/ CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-0088 CRB

UNITED STATES OF AMERICA, PLAINTIFF

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE, ET AL.,
DEFENDANTS

[Filed: July 17, 2000]

AMENDED PRELIMINARY INJUNCTION ORDER

For the reasons stated in its Memorandum and Order dated May 13, 1998 and its Order dated July 17, 2000, it is hereby ORDERED as follows:

1. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined, pending further order of the Court, from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1); and

2. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined from using the premises of 1755 Broadway, Oak-

land, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Jeffrey Jones is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana.

4. It shall not be a violation of this injunction for defendants to seek and obtain legal advice from their attorneys.

5. Pursuant to Federal Rule of Civil Procedure 65(d), this injunction shall bind the defendants, their officers, agents, servants, employees, successors, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order by personal service or otherwise.

6. The foregoing injunction does not apply to the distribution of cannabis by the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones to patient-members who (1) suffer from a serious medical condition, (2) will suffer imminent harm if the patient-member does not have access to cannabis, (3) need cannabis for the treatment of the patient-member's medical condition, or need cannabis to alleviate the medical condition or symptoms associated with the medical condition, and (4) have no reasonable legal alternative to cannabis for the effective treatment or alleviation of the patient-member's medical condition or symptoms associated with the medical condition because the patient-member has tried all other legal alternatives to cannabis and the alternatives have been ineffective in treating or allevia-

ting the patient-member's medical condition or symptoms associated with the medical condition, or the alternatives result in side effects which the patient-member cannot reasonably tolerate.

IT IS SO ORDERED.

Dated: July 17, 2000

/s/ CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-00085 CRB, C 98-00086 CRB,
C 98-00087 CRB, C 98-00088 CRB,
C 98-00245 CRB.

UNITED STATES, PLAINTIFF

v.

CANNABIS CULTIVATORS CLUB, ET AL., DEFENDANTS

AND RELATED CASES

[Filed: Oct. 16, 1998]

ORDER IN CASE NO. 98-00088
(OAKLAND CANNABIS BUYERS' COOPERATIVE)

On October 13, 1998, the Court issued a Memorandum and Order modifying the preliminary injunction order issued on May 19, 1998 ("the October 13th Order"). The Court stayed the October 13th Order until 5:00 p.m. today. Now before the Court is defendants' ex parte application for a further stay pend-

ing appeal and for modification of the preliminary injunction order.

Good cause appearing therefore, defendants' request that the Court continue the stay of the October 13, 1998 Order to permit defendants to file an emergency request for a stay in the Ninth Circuit Court of Appeals is GRANTED. The Court hereby STAYS the October 13th Order until 5:00 p.m. Monday, October 19, 1998, *provided defendants file their request for an emergency stay with the Ninth Circuit Court of Appeals by the close of business today*, Friday, October 16, 1998. All further requests for a stay must be directed to the Ninth Circuit Court of Appeals.

Defendants' request for a stay pending resolution of their appeal is DENIED. Defendants' request to modify the preliminary injunction is also DENIED.

IT IS SO ORDERED.

Dated: October 16, 1998

/s/ CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-00085 CRB, C 98-00086 CRB,
C 98-00087 CRB, C 98-00088 CRB,
C 98-00245 CRB

UNITED STATES, PLAINTIFF

v.

CANNABIS CULTIVATORS CLUB, ET AL., DEFENDANTS

AND RELATED CASES

[Filed: Oct. 13, 1998]

MEMORANDUM AND ORDER RE: MOTIONS IN LIMINE AND ORDER TO SHOW CAUSE IN CASE NO. 98-00088 (Oakland Cannabis Buyers' Cooperative)

Now before the Court are plaintiff's motions in limine to exclude defendants' affirmative defenses and the Court's Order to Show Cause why defendants are not in contempt of the Court's May 19, 1998 order. After carefully considering the papers and evidence sub-

mitted by the parties, and having had the benefit of oral argument on October 5, 1998, plaintiff's motions are GRANTED. The Court further finds that defendants have not offered any evidence to controvert plaintiff's evidence that defendants' violated the May 19, 1998 preliminary injunction order. Thus, defendants are in contempt of the injunction.

BACKGROUND

On May 19, 1998, the Court issued an order preliminarily enjoining defendants Oakland Cannabis Buyers' Cooperative ("OCBC") and Jeffrey Jones, from, among other things, "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture or distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)," and "using the premises of 1755 Broadway, Oakland, California for the purposes of engaging in the manufacture and distribution of marijuana." Upon motion of the plaintiff, and after hearing oral argument and considering the papers submitted by the parties, the Court ordered defendants to show cause "why they should not be held in civil contempt of the Court's May 19, 1998 Preliminary Injunction Order by distributing marijuana and by using the premises of 1755 Broadway, Oakland, California, for the purpose of distributing marijuana, on May 27, 1998." The show cause order was based upon evidence submitted by plaintiff as follows:

(1) On May 20, 1998, one day after the Court entered the injunction, defendants OCBC and Jeffrey Jones issued a press release entitled "Oakland Cooperative to Openly Dispense Medical Marijuana for First Time Since Preliminary Injunction – U.S.

Attorney to be Notified: HIV, Multiple Sclerosis and Other Seriously Ill Patients to Receive Pot at 11:00 a.m., Thursday May 21, Oakland Buyers Cannabis Co-operative, 1755 Broadway, Oakland."

(2) A declaration from Special Agent Peter Ott that on May 21, 1998, he entered the OCBC in an undercover capacity and observed approximately fourteen sales or distributions of what appeared to be marijuana by persons associated with the OCBC, including Jeffrey Jones, several of which were made in front of news cameras.

(3) Evidence that the World Wide Web site of the OCBC, which indicates that it was updated on June 1 and August 12, 1998, states: "Currently, we are providing medical cannabis and other services to over 1,300 members."

(4) A declaration from Special Agent Bill Nyfeler that on May 27, 1998 he placed a recorded telephone call to the OCBC, at (510) 832-5346. The individual who answered the phone informed Special Agent Nyfeler that the OCBC was still open for business, and told Special Agent Nyfeler the club's business hours.

(5) A declaration from Special Agent Dean Arnold that on June 16, 1998 he placed a recorded telephone call to the OCBC, at (510) 843-5346. An unidentified male answered the telephone and informed Special Agent Arnold that the OCBC was open for business and was accepting new members. The unidentified male further informed Special Agent Arnold about the requirements of becoming an OCBC member, the hours that the club was open (11 a.m. - 1 p.m., and 5 p.m. - 7

p.m.), and the location of the OCBC, at 1755 Broadway Avenue, in Oakland.

(6) Evidence that in an article entitled *Marijuana Clubs Defy Judge's Order* by Karyn Hunt, which appeared on May 22, 1998, in *AP Online*, defendant Jeffrey Jones is quoted as stating, "We are not closing down. We feel what we are doing is legal and a medical necessity and we're going to take it to a jury to prove that."

The Court's show cause order specifically advised defendants that their response to the order should include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer.

In response to the show cause order, defendants argue (1) that plaintiff has not made a prima facie showing that defendants violated the Court's injunction, and (2) in the alternative, that defendants have submitted evidence sufficient to support their affirmative defenses of "joint user," "necessity," and "substantive due process." Defendants incorporate all declarations previously filed in this case, and have submitted 12 new declarations, including declarations from eight OCBC patients. The patients testify as to their need for marijuana to alleviate the symptoms of their serious illnesses or disabilities. Of the eight patients, none states that he or she received marijuana from defendants on May 21, 1998, although four, Michael M. Alcalay, M.D., M.P.H., Albert Dunham, Kenneth Estes, and Yvonne Westbrook attest that they were present at the OCBC on that date. The other four do not declare that they were present at the OCBC on May 21.

Several of the declarants, including Dr. Alcalay, the OCBC Medical Director, Laura A. Galli, R.N., an OCBC patient and volunteer nurse, and James D. McClelland, the OCBC Chief Financial Officer and an OCBC board member, testify as to the OCBC's strict requirements for admission to the OCBC. In addition, defendants offer the expert testimony of Harvard physician Lester Grinspoon, M.D. and John P. Morgan, M.D., Professor of Pharmacology at City University of New York as to the medical benefits of marijuana and why other drugs, such as Marinol, are not a reasonable alternative for some patients. At defendants' request, the Court also takes judicial notice of the physician declarations filed in *Conant v. McCaffrey*, 97-0139 FMS.

Plaintiff has moved in limine to exclude defendants' affirmative defenses and defendants have moved for an order granting use immunity to defendants Jeffrey Jones and other witnesses who are unwilling to testify in this action without such immunity. The Court heard oral argument on October 5, 1998, and thereafter took the matter under submission.

DISCUSSION

I. THE MOTIONS FOR IMMUNITY.

District courts generally do not have the authority to confer use immunity for defense witnesses who invoke the Fifth Amendment privilege against self-incrimination. *See United States v. Baker*, 10 F.3d 1374, 1414 (9th Cir. 1993). In *Simmons v. United States*, 390 U.S. 377 (1968), however, the Supreme Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his

testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394 ("we find it unconscionable that one constitutional right should have to be surrendered in order to assert another"). The Third Circuit subsequently extended *Simmons* to a criminal defendant confronted with the dilemma of whether to offer favorable testimony at his bail hearing, which testimony was required because of a presumption of dangerousness arising under the Bail Reform Act, or safeguard his Fifth Amendment right not to testify. *See United States v. Perry*, 788 F.2d 100, 115-16 (3d Cir. 1986). The *Perry* court held that the trial court should have granted the defendant use immunity because the defendant's testimony at the bail hearing was "necessary to vindicate the most fundamental of all constitutional rights, the right of liberty from civil incarceration." *Id.* at 116.

Defendant Jones argues that he, too, is being forced to choose between his Fifth Amendment privilege and his right of liberty since he might be fined or even jailed as a sanction if he is found in contempt. Plaintiff, however, has represented that it is not seeking fines or incarceration to compel Jones to comply with the Court's injunction and the Court will not consider such remedies. As Jones is not being forced to choose between competing constitutional rights, *Simmons* and *Perry* are inapplicable even assuming they apply to defendants in a civil contempt proceeding.

Defendants also argue that the Court can and should grant use immunity to defendants' witnesses to protect defendants' right to due process and a fair trial. In *United States v. Lord*, 711 F.2d 887, 890-92 (9th Cir.

1983), and *United States v. Westerdahl*, 945 F.2d 1083, 1085-87 (9th Cir. 1991), the Ninth Circuit recognized that a defendant may be denied a fair trial as a result of the government's failure to provide use immunity to the testimony of a defense witness. *Lord* and *Westerdahl* are inapplicable to these contempt proceedings for two reasons.

First, both cases were criminal prosecutions where the defendant's right to liberty was at stake. Defendants have not cited any cases, and the Court is aware of none, in which the *Lord* and *Westerdahl* principle has been extended to civil cases.

Second, the Ninth Circuit requires some prima facie evidence of prosecutorial misconduct before a grant of immunity may be given. *See Baker*, 10 F.3d at 1414; *Westerdahl*, 945 F.2d at 1086; *Lord*, 711 F.2d at 892. In *Westerdahl*, for example, the government had granted immunity to a key prosecution witness, but had refused to immunize defendant's potentially exculpatory witness. The court held that the district court should have held an evidentiary hearing to determine if the government "intentionally distorted the facts." *Id.* at 1087. Defendants have not made such a prima facie showing here. At best, all that defendants have shown is that plaintiff has refused to immunize defendants' witnesses, forcing the witnesses to decide whether to testify in the contempt proceeding or potentially incriminate themselves. Such a choice cannot in and of itself constitute misconduct since a defendant "has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995).

II. THE MOTIONS IN LIMINE.

A. The Legal Standard.

A defendant is entitled to have the judge instruct the jury on his theory of defense only if it is "'supported by law and has some foundation in evidence.'" *United States v. Gomez-Osorio*, 957 F.2d 636, 642 (9th Cir. 1992). A district judge may preclude a party from offering evidence in support of a defense, including a necessity defense, by granting a motion in limine. *See United States v. Aguilar*, 883 F.2d 662, 692 (9th Cir. 1989); *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985). "The sole question presented in such situations is whether the evidence, as described in the offer of proof, is insufficient as a matter of law to support the proffered defense." *Dorrell*, 758 F.2d at 430. "If it is, then the trial court should exclude the defense and the evidence offered in support." *Id.*

B. The "Joint User" Defense.

In *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977), defendants, husband and wife, were charged with violating 21 U.S.C. § 841(a) by possessing cocaine with intent to distribute. *See id.* at 447. The Second Circuit held that "a statutory 'transfer' could not occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use." *United States v. Wright*, 593 F.2d 105, 107 (9th Cir. 1979) (discussing *Swiderski*). The court thus concluded that the trial judge erred by denying "the jury the opportunity to find that the defendants, who bought the drugs in each other's physical presence, intended

merely to share the drugs" and thus, not to distribute them. *Id.*; *Swiderski*, 548 F.2d at 450.

Defendants here, unlike the defendants in *Swiderski*, have not offered any evidence of the literal joint purchase of the marijuana they are alleged to have distributed on May 27, 1998. Defendants contend nonetheless that because the OCBC is operated as a cooperative, the marijuana is effectively purchased together by all its members and is consumed together by all its members since the marijuana is only distributed to members of the cooperative. Thus, defendants argue, they are entitled to a *Swiderski* instruction.

The Court declines to extend *Swiderski* to the facts as presented by defendants' proffer, namely a medical marijuana cooperative. As the Court has previously noted, *Swiderski* involved a simultaneous purchase by a husband and wife who testified they intended to use the controlled substance immediately. Applying *Swiderski* to a medical marijuana cooperative would extend *Swiderski* to a situation in which the controlled substance is not literally purchased simultaneously for immediate consumption. *See United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1101 (N.D. Cal. 1998). In light of the fact that *Swiderski* has never been so extended, and in light of the fact that is has not been adopted by the Ninth Circuit, the Court concludes that such a defense is not available on the facts proffered by defendants as a matter of law.

C. <u>The Necessity Defense.</u>

To be entitled to a jury instruction on the defense of necessity, defendants must offer evidence (1) that they

were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) that there were no legal alternatives to violating the law. *See United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989). Defendants have produced evidence that marijuana has a medical benefit to many persons and that for some persons marijuana is the only drug that can alleviate their pain and other debilitating symptoms. They also have submitted evidence that they carefully screen their members to ensure that they have a physician's recommendation for marijuana use. Further, the Court will assume, without deciding, that the four OCBC patients who have submitted declarations and admit to having been present at the OCBC on May 21, 1998, have submitted sufficient evidence as to their need for marijuana to permit a trier of fact to determine if they have a legal necessity for marijuana.

Plaintiff argues that a necessity defense based upon a medical need for marijuana is never available under any circumstances as a defense to a violation of the Controlled Substances Act because Congress implicitly rejected such a defense by placing marijuana in Schedule I. The Court need not address this issue, however, because it concludes that defendants have not produced sufficient evidence in their offer of proof to permit a defense of necessity to the charge that they violated the injunction.

In *Aguilar*, the Ninth Circuit considered a necessity defense offer of proof similar to that offered by defendants here. The *Aguilar* defendants were charged with violations of the immigration laws, arising from

their providing sanctuary to Central American refugees. With respect to the specificity required of a necessity offer of proof, the court held:

> We also doubt the sufficiency of the proffer to establish imminent harm. *The offer fails to specify that the particular aliens assisted were in danger of imminent harm.* Instead, it refers to general atrocities committed by Salvadoran, Guatemalan, and Mexican authorities. The only indication that appellants intended to show that the aliens involved in this action faced imminent harm was their proffer that they adopted a process to screen aliens in order to assure themselves that those helped actually were in danger. *This allegation fails for lack of specificity.*

Id. at 692 n.28 (emphasis added). Defendants' proffer here likewise fails to identify evidence that demonstrates that each of the particular persons to whom they distributed marijuana on May 21, 1998 was in danger of imminent harm.

Plaintiff has submitted the declaration of a Special Agent Ott who testifies that he personally witnessed fourteen marijuana transactions on May 21, 1998. Moreover, defendants' evidence suggests that they may have distributed marijuana to as many as 191 "visitors" to the OCBC on May 21, 1998. Defendants, however, have proffered evidence as to only four patients who admit to visiting the OCBC on May 21. Assuming that these four patients obtained marijuana from the OCBC on May 21, defendants have, at best, offered a necessity defense to only four of the fourteen transactions identified by plaintiff, putting aside the fact that defendants' own evidence suggests there were as many as 191

marijuana transactions that day. Such a proffer does not meet the specificity requirements of *Aguilar*, namely, that defendants proffer evidence that the particular persons to whom they distributed marijuana were as a matter of fact in danger of imminent harm. As the Court stated before the injunction was issued, "for the defense of necessity to be available here, *defendants would have to prove that each and every patient* to whom it provides cannabis is in danger in imminent harm; that the cannabis will alleviate the harm for that particular patient; and that the patient had no other alternatives, for example, that no other legal drug could have reasonably averted the harm." *Cannabis Cultivators Club*, 5 F. Supp.2d at 1102 (emphasis added). Defendants have not done so in response to the show cause order, and they have not offered that they could do so at a jury trial.

Moreover, under *Aguilar*, defendants' evidence as to the OCBC's stringent admission requirements and their evidence as to the medical benefits of marijuana generally, rather than to the particular persons to whom defendants distributed marijuana on May 21, is immaterial as a matter of law. The defendants must show that *each* person to whom they distributed marijuana was actually in danger of imminent harm. It is not sufficient that defendants reasonably believed each person to be in such danger.

Defendants contend that a jury should be allowed to consider their necessity defense because their evidence demonstrates that on May 21, 1998 they were in substantial compliance with the Court's injunction. Under defendants' reasoning, however, a defendant would be excused from complying with the Controlled Sub-

stances Act because *some*, but not all, of the people to whom they distributed marijuana had a legal necessity. No case of which this Court is aware has ever allowed such a blanket exemption to the criminal laws.

Defendants argue in the alternative that their proffer could not be more specific because plaintiff failed to identify the specific persons to whom plaintiff alleges defendants distributed marijuana. The Order to Show Cause, however, was limited to a single day and the plaintiff's evidence as to the government agent's personal observation of fourteen marijuana transactions in the OCBC—transactions which the defendants announced publicly in advance and invited the public, including the United States Attorney for the Northern District of California, to witness—occurred during a fifteen to twenty minute period. Plaintiff's evidence thus places particular transactions at issue. If defendants did not distribute marijuana on May 21, 1998, they could offer evidence that they did not. If they did distribute marijuana that day, such distribution violated the injunction. *See Cannabis Cultivators Club*, 5 F. Supp.2d at 1100 (holding that the Controlled Substances Act "does not exempt the distribution of marijuana to seriously ill persons for their personal medical use"). If they believe their violations of the injunction are excused by the defense of necessity, it is incumbent upon defendants to come forward with the evidence to support their defense as to each violation. They have not done so for all, or even most, of the transactions at issue. Accordingly, their defense of necessity fails as a matter of law.

D. **Substantive Due Process.**

Defendants contend that they are not in contempt because the OCBC members have a fundamental right to "a demonstrated and effective treatment as recommended by their physician that can alleviate their agony, preserve their sight, and save their lives." Assuming, without deciding, that such a fundamental right exists, the defense fails for the same reason their necessity defense fails; defendants have failed to proffer evidence that each and every person to whom they distributed marijuana needed the marijuana to protect such a fundamental right. *See Cannabis Cultivators Club*, 5 F. Supp.2d at 1103. To hold otherwise would mean that because defendants have a substantive due process defense to some of the marijuana distributions in which they engaged, they are excused from all of their violations of the injunction. Defendants have not cited any case law or legal principles that would permit such an exemption from the federal laws.

II. **THE CONTEMPT PROCEEDINGS.**

A. **Whether Defendants Are In Contempt.**

The Court preliminarily enjoined defendants from violating the Controlled Substances Act pursuant to 21 U.S.C. section 882(a). As this Court has previously noted, 21 U.S.C. section 882(b) provides that "[i]n case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by jury in accordance with the Federal Rules of Civil Procedure." The plaintiff nonetheless argues that the Court should find defendants in

contempt without a jury trial because plaintiff's evidence of defendants' violation of the Court's injunction is uncontroverted.

In the Ninth Circuit, a civil contempt proceeding is a trial within the meaning of Federal Rule of Civil Procedure 43(a), rather than a hearing on a motion within the meaning of Rule 43(e). *See Hoffman v. Beer Drivers and Salesmen's Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976). A trial with live testimony, however, is not always required before contempt sanctions may be issued. In *Peterson v. Highland Music, Inc.*, 140 F.3d 1313 (9th Cir. 1998), *cert. pet. filed* Sep. 14, 1998, for example, the district court commenced contempt proceedings by issuing an order to show cause. The court then had the parties file affidavits and extensively brief the relevant issues. The court did not, however, hold an evidentiary hearing (or trial) with live testimony. Instead, the district court issued its contempt sanctions at the end of the hearing on the order to show cause. *See id.* at 1324.

The Ninth Circuit affirmed the imposition of the contempt sanctions. The court held that while "ordinarily" a court should not impose contempt sanctions on the basis of affidavits, "'[a] trial court may in a contempt proceeding narrow the issues by requiring that affidavits on file by controverted by counter-affidavits and may thereafter treat as true the facts set forth in uncontroverted affidavits.'" *Id.* (quoting *Hoffman*, 536 F.2d at 1277). The court concluded that such procedures do not violate due process.

Defendants contend that the Court must grant them a jury trial on the issue of contempt because "[f]act-

finding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law." *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984). Defendants also urge that a court should exclude evidence of a defense only if the evidence is insufficient as a matter of law to support the defense. *See id.* The Court agrees. Here, however, the Court has ruled that the evidence submitted by defendants is insufficient as a matter of law to support the defenses of "joint user," "necessity," and "substantive due process." The question presented is thus whether there are any "facts" for a jury to decide. Defendants have offered no facts whatsoever to controvert plaintiff's evidence that defendants distributed marijuana at the OCBC on May 21, 1998. Nor have they identified any evidence that they could present to a jury that they have not already presented that would create a dispute of fact. *If there are no facts to be decided by a jury, there is no reason to have a jury trial.*

The Court has reviewed the statute conferring the right to a jury trial and concludes that its decision that defendants are entitled to a jury trial only if there is a material dispute of fact is not inconsistent with the statute. Congress provided defendants with a right to a jury trial "in accordance with the Federal Rules of Civil Procedure." 21 U.S.C. § 882(b). Thus, this is not a criminal proceeding in which a defendant is entitled to a jury trial even if there are no disputes of fact. *Compare* 21 U.S.C. § 882(b) *with* 18 U.S.C. § 3691 ("Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal

offense under any Act of Congress, or under the laws of any state in which it was done or omitted, *the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases*") (emphasis added). Moreover, since the trial is to be conducted in accordance with the Rules of Civil Procedure, Rule 50 with respect to "Judgment as a Matter of Law" applies. If the question of whether defendants violated the Court's order on May 21, 1998 were tried to a jury, the Court would be obligated to grant judgment in accordance with Rule 50 since there is no dispute that defendants violated the injunction and the Court has concluded that defendants do not have a defense to their violations as a matter of law.

Defendants also argue that plaintiff's evidence is insufficient to support a finding of contempt by clear and convincing evidence, even without considering defendants' affirmative defenses. The Court disagrees. Plaintiff submitted uncontroverted evidence that defendants issued a press release announcing that they were going to distribute marijuana at the OCBC on May 21, 1998. Plaintiffs also produced uncontroverted evidence that a government agent visited the OCBC at the time defendants announced they were going to distribute marijuana and that the agent personally witnessed fourteen marijuana transactions. This uncontroverted evidence is clear and convincing evidence that defendants violated the injunction and thus are in contempt of May 19, 1998 order.

B. The Remedy For Defendants' Contempt.

Plaintiff asks the Court to compel defendants to comply with the injunction by modifying the May 19, 1998 order to empower the United States Marshal to enforce the injunction. Plaintiff does not ask the Court to fine defendants or to incarcerate defendant Jeffrey Jones to compel compliance and the Court will not do so. The Court concludes that the remedy proposed by plaintiff is reasonable and designed to enforce compliance.

The Court understands defendants' argument that in this action the Court is sitting in equity and therefore must consider the human suffering that will be caused by plaintiff's success in closing down the OCBC. While the Court is sitting in equity, however, its equitable powers to not permit it to ignore federal law. Federal law prohibits the distribution of marijuana to seriously ill persons for their personal medical use. *See Cannabis Cultivators Club*, 5 F. Supp.2d at 1100. The Court accordingly proposes to modify its May 19, 1998 preliminary injunction in 98-00088 to provide as follows:

> The United States Marshal is empowered to enforce this Preliminary Injunction. In particular, the United States Marshal is authorized to enter the premises of the Oakland Cannabis Buyers' Cooperative at 1755 Broadway, Oakland, California, at any time of the day or night, evict any and all tenants, inventory the premises, and padlock the doors, until such time that defendants can satisfy the Court that they are no longer in violation of the injunctive order and that they would in good faith thereafter comply with the terms of the order.

The Court will stay the imposition of the modification to the injunction until 5:00 p.m. on Friday, October 16, 1998 to give defendants the opportunity to seek interim appellate relief.

CONCLUSION

For the foregoing reasons, plaintiff's motions to preclude defendants' affirmative defenses of "joint user," "necessity," and "substantive due process," are GRANTED. The Court concludes further that defendants have not offered any evidence to controvert plaintiff's evidence that defendants' [*sic*] distributed marijuana at the OCBC on May 21, 1998 in violation of the Court's May 19, 1998 preliminary injunction order and therefore that there are no factual disputes to be tried to a jury. The Court accordingly finds defendants in contempt of its May 19, 1998 order. In order to compel defendants to comply with the injunction, the Court will modify the injunction to empower the United States Marshal to enforce the injunction order.

IT IS SO ORDERED.

Dated: October 13, 1998

/s/ CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-00088 CRB

UNITED STATES OF AMERICA, PLAINTIFF

v.

OAKLAND CANNIBAS [*sic*] BUYERS' COOPERATIVE AND JEFFREY JONES, DEFENDANTS

[Filed: May 19, 1998]

PRELIMINARY INJUNCTION ORDER

For the reasons stated in its Memorandum and Order dated May 13, 1998, it is hereby ORDERED as follows:

1. Defendants Oakland Cannibas [*sic*] Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined, pending further order of the Court, from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1); and

2. Defendants Oakland Cannibas [*sic*] Buyers' Cooperation and Jeffrey Jones are hereby preliminarily enjoined from using the premises at 1755 Broadway,

Oakland, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Jeffrey Jones is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana.

4. It shall not be a violation of this injunction for defendants to seek and obtain legal advice from their attorneys.

5. Pursuant to Federal Rule of Civil Procedure 65(d), this injunction shall bind the defendants, their officers, agents, servants, employees, successors, and attorneys, and those persons in active concert or participation with them who receive notice of the order by personal service or otherwise.

IT IS SO ORDERED.

Dated: May 19, 1998

/s/ CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Nos. C 98-0085 CRB, C 98-0086 CRB,
C 98-0087 CRB, C 98-0088 CRB,
C 98-0089 CRB and C 98-0245 CRB.

UNITED STATES OF AMERICA, PLAINTIFF

v.

CANNABIS CULTIVATORS CLUB; AND
DENNIS PERON, DEFENDANTS
AND RELATED ACTIONS

[Filed: May 13, 1998]

MEMORANDUM AND ORDER

BREYER, District Judge.

INTRODUCTION

The issue presented by these related lawsuits is whether defendants' admitted distribution of marijuana for use by seriously ill persons upon a physician's recommendation violates federal law, 21 U.S.C. § 841(a), and if so, whether defendants' conduct in this regard should be enjoined pursuant to the injunctive relief provisions of the federal Controlled Substances Act.

See 21 U.S.C. § 882(a). This is the *only* issue before the Court. These lawsuits, for example, do not challenge the constitutionality of Proposition 215, the medical marijuana initiative, as a whole. Nor do they reflect a decision on the part of the federal government to seek to enjoin a local governmental agency from carrying out the humanitarian mandate envisioned by the citizens of this State when they voted to approve this law.

These cases also do not present the question of whether all conduct exempt from prosecution under the state drug laws by Proposition 215 violates federal law. For example, the Court is not deciding whether a seriously ill person who possesses marijuana for personal use upon a physician's recommendation is in violation of federal law. Rather, the sole issue here is whether defendants' conduct, which may be lawful under state law, may nevertheless violate federal law and can thus be enjoined.

Finding that there is a strong likelihood that defendants' conduct violates the Controlled Substances Act, the Court concludes that the Supremacy Clause of the United States Constitution requires that the Court enjoin further violations of the Act.

BACKGROUND

A. *Proposition 215 and the Federal Drug Laws.*

In November 1996, 56% of those participating in the state-wide election voted in favor of Proposition 215, the "Medical Use of Marijuana" initiative, known also as the "Compassionate Use Act" (the "Act"). The Act makes it legal under California law for seriously ill

patients and their primary caregivers to possess and cultivate marijuana for use by the seriously ill patient if the patient's physician recommends such treatment. In particular, it exempts a seriously ill patient, or the patient's primary caregiver, from prosecution under California Health and Safety Code § 11357, relating to the possession of marijuana, and § 11358, relating to the cultivation of marijuana. *See* California Health & Safety Code § 11362.5(d).

As a result of the passage of Proposition 215, several individuals, including defendants, organized "medical cannabis dispensaries" to meet the needs of seriously ill patients. These nonprofit dispensaries provide marijuana to seriously ill patients upon a physician's recommendation. According to defendants, these patients previously had to purchase marijuana, if they were able to purchase it at all, on the black market at exorbitant prices and of questionable quality.

At the time that California's voters approved the initiative, federal law—the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Controlled Substances Act")—did, and still does, strictly prohibit the manufacture and distribution of marijuana, and the possession of marijuana with the intent to manufacture or distribute. *See* 21 U.S.C. § 841(a)(1). In particular, the Controlled Substances Act established a comprehensive regulatory scheme which placed controlled substances in one of five "Schedules" depending on each substance's potential for abuse, the extent to which each may lead to psychological or physical dependence, and whether each has a currently accepted medical use in the United States. *See* 21 U.S.C. § 812(b). Congress determined that "Schedule I" substances have a "high

potential for abuse," "no currently accepted medical use in treatment in the United States," and a lack of accepted "safety for use of the drug or substance under medical supervision." 21 U.S.C. § 812(b)(1). Schedule I substances are strictly regulated; no physician may dispense any Schedule I controlled substance to any patient outside of a strictly controlled research project registered with the DEA, and approved by the Secretary of Health and Human Services, acting through the Food and Drug Administration ("FDA"). *See* 21 U.S.C. § 823(f). Congress placed marijuana in Schedule I at the time it passed the Controlled Substances Act and its designation has not changed since then. *See* 21 U.S.C. § 812(c)(c)(10) [*sic*].

B. ***The California Courts and Proposition 215.***

In *People v. Trippet*, 56 Cal. App. 4th 1532, 66 Cal.Rptr.2d 559 (1997), the California Court of Appeal, First District, interpreted Proposition 215 for the first time in a published decision. It held that although Proposition 215 does not exempt a seriously ill patient and her primary caregiver from Health and Safety Code § 11360, which prohibits the transportation of marijuana, a defendant in a criminal case might have a Proposition 215 defense to a charge of illegally transporting marijuana if "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." *Trippet*, 56 Cal. App. 4th at 1550-51, 66 Cal. Rptr.2d 559. The court reasoned that Proposition 215 would make no sense if a patient's primary caregiver would be guilty of a crime for "carrying otherwise legally cultivated and possessed marijuana down a hall-

way to the patient's room." *Id.* at 1550, 66 Cal.Rptr.2d 559.

Three months later, a different division of the same court decided *People ex rel. Lungren v. Peron*, 59 Cal. App. 4th 1383, 70 Cal.Rptr.2d 20 (1997). A unanimous court held that the defendants in that action, Dennis Peron and the San Francisco Cannabis Cultivators Club, both defendants here, are not primary caregivers within the meaning of the statute. A majority of that court disagreed with *Trippet* by also holding that while Proposition 215 exempts seriously ill patients and their caregivers from California law prohibiting the possession and cultivation of marijuana (Health & Safety Code § 11357, § 11358), it does not, under any circumstances, exempt them from Health and Safety Code § 11359 and § 11360, which prohibit the sale or giving away of marijuana. *Id.* at 1392, 70 Cal. Rptr.2d 20. The California Supreme Court denied review of that decision on February 25, 1998.

C. *The Federal Lawsuits.*

Less than a month after the *Peron* decision, and more than a year after California's voters approved Proposition 215, the United States filed six separate lawsuits against six independent cannabis dispensaries and individuals associated with the management of the dispensaries.[1] The federal government alleges that

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[1] The defendants in the related actions are: Cannabis Cultivators Club and Dennis Peron (98-0085); Marin Alliance for Medical Marijuana and Lynette Shaw (98-0086); Ukiah Cannabis Buyers' Club, Cherrie Lovett, Marvin Leherman and Mildred Leherman (98-0087); Oakland Cannabis Buyers' Cooperative and Jeffrey Jones (98-0088); Flower Therapy Medical Marijuana Club,

defendants' manufacture and distribution of marijuana, and possession with the intent to manufacture and distribute marijuana, violates 21 U.S.C. § 841(a)(1); defendants' use of a facility (i.e., the locations of the dispensaries) for the purpose of manufacturing and distributing marijuana violates 21 U.S.C. § 856(a)(1); and that the individual defendants' conspiracy to violate the Controlled Substances Act violates 21 U.S.C. § 846. The lawsuits seek to preliminarily and permanently enjoin defendants' conduct pursuant to the statute which provides the federal district courts with jurisdiction to enjoin violations of the Controlled Substances Act. *See* 21 U.S.C. § 882(a).

On the same day the federal government filed its lawsuits, it filed motions for a preliminary injunction, permanent injunction and summary judgment in each action. In support of its motions, the government submitted the affidavits of several government agents who attest to their undercover purchases of marijuana from defendants at the various defendant dispensaries.

The six lawsuits were randomly assigned to various judges of this District. Pursuant to Local Rule 3-12, all six were reassigned to this Court as related cases. The Court held a status conference on January 30, 1998, to address defendants' request for additional time to respond to the federal government's motions. At the status conference, and in their papers in support of their request for a continuance, defendants advised the Court that they strenuously dispute the factual assertions in the affidavits with respect to the sale of

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John Hudson, Mary Palmer and Barbara Sweeney (98-0089); and Santa Cruz Cannabis Buyers Club (98-0245).

marijuana to non-seriously ill persons and persons without a physician's recommendation, and contend that much of the federal government's evidence was obtained in violation of the fourth amendment. Over the federal government's objection, the Court granted defendants an extension of time to respond. The Court further ordered that

> [f]or purposes of plaintiff's motions, the parties shall assume that defendants' alleged conduct falls squarely within that permitted by California Proposition 215, California Health & Safety Code § 11362.5. For example, the parties shall assume that all defendants are "primary caregivers" within the meaning of the statute, that all persons to whom defendants distribute or dispense marijuana are seriously ill, and that a physician has determined that the person's health would benefit from the use of marijuana and has made an oral or written recommendation to that effect. Whether the government illegally obtained the evidence upon which it bases its motions shall not be addressed at this time.

February 9, 1998 Order. By its Order, the Court sought to avoid a factual dispute as to whether Proposition 215 applies to defendants' conduct.

Prior to the hearing on the federal government's motions, defendants filed a motion to dismiss for lack of jurisdiction on the ground that Congress does not have authority under the Commerce Clause to regulate defendants' conduct. Defendants also moved to dismiss on the ground that the Court should abstain pursuant to various abstention doctrines.

The Court also received memoranda in opposition to the federal government's motion from *amici curiae* City and County of San Francisco, as represented by the San Francisco District Attorney, and other cities in which defendant dispensaries are located. The City and County of San Francisco and the other cities urge the Court not to adopt the injunctive relief sought by the federal government because of the adverse consequences an injunction would have on the public health of their citizens. In particular, the San Francisco District Attorney asks the Court to limit any injunction so as not to exclude distribution to those patients for whom marijuana is a medical necessity, possibly by the City and County of San Francisco itself. *See* Memorandum of *Amicus Curiae* District Attorney of San Francisco at 11.

The Court held a hearing on all pending motions on March 24, 1998. All parties, and *amici curiae* San Francisco District Attorney, argued at the hearing. The Court requested that the parties submit additional briefing on issues raised at the hearing and took the matter under submission on April 16, 1998.

DISCUSSION

The Supremacy Clause of Article VI of the United States Constitution mandates that federal law supersede state law where there is an outright conflict between such laws. *See Gibbons v. Ogden*, 22 (9 Wheat) U.S. 1, 210, 6 L.Ed. 23 (1824); *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L.Ed.2d 180 (1962); *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997) (state law is preempted "where it is impossible to comply with both state and federal require-

ments, or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress"). Recognizing this basic principle of constitutional law, defendants do not contend that Proposition 215 supersedes federal law, 21 U.S.C. § 841(a). Indeed, Proposition 215 on its face purports only to exempt certain patients and their primary caregivers from prosecution under certain *California* drug laws—it does not purport to exempt those patients and caregivers from the federal laws. One of the ballot arguments in favor of the initiative in fact states: "Proposition 215 allows patients to cultivate their own marijuana simply because federal law prevents the sale of marijuana and a state initiative cannot overrule those laws." *Peron*, 59 Cal.App.4th at 1393, 70 Cal.Rptr.2d 20 (quoting Ballot Pamphlet, Proposed Amends. to Cal. Const. with arguments to voters, Gen.Elec. (Nov. 5, 1996 p. 60)).

Defendants argue instead that the Court should dismiss the federal government's actions on abstention grounds and on the ground that 21 USC § 841(a) exceeds Congress's authority under the Commerce Clause. Assuming that the Court has jurisdiction, defendants' arguments fall into three categories: (1) defendants have not violated the federal law; (2) defendants have valid defenses to their violation of the law; and (3) equitable principles preclude injunctive relief. We now turn to each of these arguments.

I. Jurisdiction.

A. *Abstention.*

We start with the proposition that the federal courts have an "unflagging obligation" to exercise their jurisdiction. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976); *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983). While the defendants have asked the Court to abstain, abstention is an "extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." *Colorado River Water Conservation Dist.*, 424 U.S. at 813, 96 S. Ct. 1236 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S. Ct. 1060, 3 L.Ed.2d 1163 (1959)). Defendants contend that the "extraordinary and narrow" exception to this duty exists here under *Burford*, *Pullman* or *Colorado River*, abstention doctrines.

1. *Burford* Abstention.

Burford abstention is based on comity. It may be appropriate if the lawsuit involves difficult questions of state law, resolution of which is a matter of substantial local concern transcending the result in the case at bar. Federal courts may abstain in such cases if federal adjudication would be disruptive of state efforts to establish a coherent policy with respect to the matter at issue. *See New Orleans Public Service, Inc. v. City Council of New Orleans*, 491 U.S. 350, 362, 109 S. Ct. 2506, 105 L.Ed.2d 298 (1989); *Burford v. Sun Oil Co.*, 319 U.S. 315, 334, 63 S. Ct. 1098, 87 L.Ed. 1424 (1943). *Burford* abstention is appropriate only if the following factors are met:

> (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy.

Tucker v. First Maryland Savings & Loan, Inc., 942 F.2d 1401, 1404-05 (9th Cir. 1991).

Defendants contend that questions of who is a "primary caregiver" within the meaning of Health and Safety Code § 11362.5, and precisely what conduct is permitted by Proposition 215, are difficult and uncertain issues of state law. For example, defendants contend that there is a question whether Proposition 215 exempts the transportation as well as cultivation and use of medical marijuana from California's drug laws. *Compare Peron*, 59 Cal. App. 4th at 1393-95, 70 Cal.Rptr.2d 20 *with Trippet*, 56 Cal. App. 4th at 1550-51, 66 Cal. Rptr.2d 559. They also assert that "medical marijuana" is "a policy problem of substantial import," the importance of which transcends the result in this case. They assert that "[b]y potentially invalidating Proposition 215 on preemption grounds, this court would effectively halt California's attempt to make section 11362.5 compatible with federal law." Defendants' Memorandum in Support of Motion to Dismiss at 7.

These lawsuits, however, are not appropriate candidates for *Burford* abstention. At a minimum, the second requirement for such abstention is not present. The federal issue—whether defendants' conduct vio-

lates federal law—is unrelated to the state questions identified by defendants, whether defendants' conduct is legal under state law. Proposition 215 may exempt defendants' conduct from prosecution under California's criminal laws and, for purposes of the federal government's motion, the Court has assumed that it does. But the only issue in these lawsuits is whether defendants' conduct violates federal law. *See New Orleans Public Service, Inc.*, 491 U.S. at 362, 109 S. Ct. 2506 (*Burford* abstention is inappropriate where federal issues control).

None of the cases cited by defendants in support of *Burford* abstention involved a lawsuit, such as these, where the resolution of the state law issues was immaterial. In *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290 (9th Cir. 1996), for example, the Ninth Circuit affirmed the district court's application of *Burford* abstention to an action challenging the constitutionality of Proposition 103 (insurance rate rollback initiative) because the federal issues were "intimately conjoined" with difficult and unresolved issues of state law. *Id.* at 297. Here, in contrast, the scope of Proposition 215 is not at issue since the constitutionality of the initiative is not being challenged. All that is at issue in these actions is whether defendants' conduct violates federal law. The Court need not examine state law to answer that question.

2. *Pullman* Abstention.

Defendants' opposition memorandum argued that abstention is appropriate under an additional doctrine, *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941). Under *Pullman*

abstention a federal court may defer hearing a case when "'a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S. Ct. 1060, 3 L.Ed.2d 1163 (1959)). A lawsuit must meet three criteria for *Pullman* abstention to be appropriate:

> (1) the complaint must touch a sensitive area of social policy into which the federal courts should not enter unless there is no alternative to adjudication; (2) a definitive ruling on the state issues by a state court could obviate the need for constitutional adjudication by the federal court; and (3) the proper resolution of the potentially determinative state law issue is uncertain.

Kollsman v. City of Los Angeles, 737 F.2d 830, 833 (9th Cir. 1984). Defendants submit that the Court should abstain until the California courts have had an opportunity to define more clearly what state law permits in order to minimize any conflict between state and federal laws.

Pullman abstention is nonetheless inappropriate because the second criterion, and therefore the third, are inapplicable. As stated above, whether state law permits defendants' conduct, and to what extent it permits defendants' conduct, is immaterial. The issue here is whether that conduct is prohibited by federal law. Thus, a definitive ruling on the state issues, i.e., the scope of Proposition 215, will not obviate the need for deciding the constitutional issues presented by this

lawsuit, including the alleged due process right to be free from pain.

3. *Colorado River* Abstention.

In the interest of "wise judicial administration," federal courts may stay a case involving a question of federal law where a concurrent state action is pending in which substantially similar issues are raised. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976). "[F]ederal abstention and deference to parallel state proceedings is appropriate under *Colorado River* even when none of the more established doctrines apply." *Fireman's Fund*, 87 F.3d at 297. While no one factor is determinative, the Supreme Court has listed a number of factors to consider in deciding whether such abstention is appropriate. These factors include, "the desireabilty of avoiding piecemeal litigation," and "the order in which the jurisdiction was obtained by the concurrent forums," *Colorado River*, 424 U.S. at 818-19, 96 S. Ct. 1236; whether the state court proceedings are adequate to "protect the federal litigant's rights," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 23, 103 S. Ct. 927; and the risk of conflicting results. *See Colorado River*, 424 U.S. at 818, 96 S. Ct. 1236.

Defendants assert that the state proceeding in *People v. Peron* is substantially similar to these actions since it involves a challenge to the same conduct at issue here and seeks the same relief sought here—an injunction.

The Court concludes, however, that the *People v. Peron* proceeding is not substantially similar. First, it does not involve all the parties to this lawsuit. Thus, the federal government's interests in these actions with respect to the defendants who are not defendants in *Peron* may not be adequately represented by that proceeding. Second, the issues are different. In *Peron*, the State seeks to enjoin defendant Peron's conduct on the ground that it violates state law; that is, that it does not fall within the conduct permitted by Proposition 215. Here, in contrast, the federal government seeks to enjoin defendants' conduct on the ground that it violates federal law; it is immaterial whether that conduct falls within that permitted by Proposition 215. Since the issues are not similar there is no risk of conflicting results. None of the cases cited by defendants involved a situation like here, where the federal government seeks to enforce federal law in federal court. In such a situation, this Court is required to exercise its jurisdiction.

B. *Interstate Commerce Clause.*

Since there is no basis for abstention, we now turn to the question of jurisdiction. Congress has the authority to regulate an activity pursuant to the Commerce Clause of the United States Constitution if the activity regulated falls into one of three categories:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things interstate commerce, or persons or things in interstate commerce, even though the threat may

> come only from intrastate activities. . . . Finally Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995) (citations omitted). In *Lopez*, the Supreme Court held that the Gun-Free School Zones Act of 1990 ("School Zones Act") exceeds Congress's Commerce Clause authority. The School Zones Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A)(1988 ed. Supp. V). The Court held that the School Zones Act "has nothing to do with 'commerce' or any sort of economic activity. . . . and is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561, 115 S. Ct. 1624. It noted that neither the statute nor the legislative history included any congressional findings regarding the effects of gun possession in a school zone on interstate commerce, and rejected the government's theories as to such effects. *Id.* at 562, 115 S. Ct. 1624.

Defendants contend that this Court is without jurisdiction to hear these related cases because Congress does not have the authority to regulate defendants' conduct under the Commerce Clause, just as it does not have authority to regulate possession of a firearm in a school zone. They submit that all of their activities are purely intrastate; therefore, pursuant to *Lopez*, the

Controlled Substances Act is unconstitutional as applied to them.

Congress has the power "to declare that an entire class of activities affects commerce." *Maryland v. Wirtz*, 392 U.S. 183, 192, 88 S. Ct. 2017, 20 L.Ed.2d 1020 (1968). "The only question for the courts then is whether the class is within the reach of the federal power." *Id.*; *see also United States v. Darby*, 312 U.S. 100, 120-21, 61 S. Ct. 451, 85 L.Ed. 609 (1941) (where "Congress itself has said that a particular activity affects the commerce," the only function of a court "[i]n passing on the validity of legislation . . . is to determine whether the particular activity regulated or prohibited is within the reach of the federal power"). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez v. United States*, 402 U.S. 146, 154, 91 S. Ct. 1357, 28 L.Ed.2d 686 (1971).

Congress has made detailed findings that the *intrastate* manufacture, distribution, and possession of controlled substances, as a class of activities, "have a substantial and direct effect upon interstate commerce." 21 U.S.C. § 801(3). In particular, Congress found that, "after manufacture, many controlled substances are transported in interstate commerce," *id.* § 801(3)(A); that "controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution," *id.* § 801(3)(B); that "controlled substances possessed commonly flow through interstate commerce immediately prior to such possession," *id.* § 801(4); that "[l]ocal distribution and possession of controlled substances

contribute to swelling the interstate traffic in such substances," *id.* § 801(4); and that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate," *id.* § 801(5). Therefore, "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." *Id.* § 801(6). Since *Lopez* was decided, the Ninth Circuit has held that Congress's enactment of the Controlled Substances Act is constitutionally permissible under the Commerce Clause. *See United States v. Bramble*, 103 F.3d 1475, 1479-80 (9th Cir. 1996); *United States v. Tisor*, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140, 117 S. Ct. 1012, 136 L.Ed.2d 889 (1997); *United States v. Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996); *United States v. Staples*, 85 F.3d 461, 463 (9th Cir.), *cert. denied*, 519 U.S. 938, 117 S. Ct. 318, 136 L.Ed.2d 233 (1996).

Defendants respond that the Ninth Circuit cases are inapplicable to the facts of these actions because those cases involved (1) conduct that was prohibited under state law; and (2) intrastate illicit drug trafficking activities in the same "class of activities" as those interstate activities prohibited by the Controlled Substances Act. Here, in contrast, defendants argue that their conduct—the distribution of marijuana to seriously ill patients for the patient's personal medical use—is not within that class of activities and does not substantially effect interstate commerce.

There can be no debate that when Congress passed the Controlled Substances Act it was primarily concerned with traditional for-profit drug trafficking

rather than the not-for-profit supply of medical marijuana to seriously patients in accordance with state law. Even assuming, however, that defendants' activities are within a different "class of activities" from that which Congress expressly considered, their activities are not within a class that, by its nature, does not have a substantial effect on interstate commerce. Whereas defendants' conduct in the particular instances at issue here may not have had any effect on intrastate commerce, and for purposes of the federal government's motion the Court assumes that at an evidentiary hearing defendants could prove that all marijuana was cultivated locally, distributed locally, and consumed locally by California residents, it is not true that the class of activities within which defendants' conduct falls—non-profit distribution of medical marijuana—necessarily does not affect interstate commerce.

Medical marijuana may be grown locally, or out of the state or country, and there is nothing in the nature of medical marijuana that limits it to intrastate cultivation. Similarly, it may be transported across state lines and consumed across state lines. In *Lopez*, in contrast, the class of activities prohibited—mere *possession* of a firearm near a school—does not have a substantial effect on interstate commerce. This case, unlike *Lopez*, is not about mere possession but rather about distribution, a class of activities that, even if done for the humanitarian purpose of serving the legitimate health care needs of seriously ill patients, can affect interstate commerce.

To hold that the Controlled Substances Act is unconstitutional as applied here would mean that in every

action in which a plaintiff seeks to prove a defendant violated federal law, an element of every case-in-chief would be that the defendant's specific conduct at issue, based on facts proved at an evidentiary hearing or trial, substantially affected interstate commerce. No case so holds and the Court declines to do so for the first time here. Accordingly, the Court has jurisdiction to hear this matter.

II. The Federal Government's Motion.

We now turn to the relief sought by the federal government and whether the federal government has met its burden.

A. *The Motion for a Preliminary Injunction is the Only Motion Before the Court.*

The federal government styled its moving papers as a motion for "preliminary injunction, permanent injunction and summary judgment." It filed this hybrid motion the same day it filed the six related lawsuits. Defendants correctly object to the motion for summary judgment on the ground that the Federal Rules of Civil Procedure permit a motion for summary judgment by a plaintiff "at any time after the expiration of 20 days from the commencement of the action." Fed. R. Civ. P. 56(a). The federal government's motion for summary judgment was thus premature. The federal government contends that it orally renoticed the motions during the scheduling conference on January 30, 1998. The Court's February 9, 1998 Order, however, set the briefing schedule for the federal government's motion for *preliminary injunction* only; it made no mention of a motion for summary judgment. If the federal govern-

ment believed the Court was in error, it had an obligation to so notify the Court and the defendants at that time. As it failed to do so, the only federal government motion pending is the motion for a preliminary injunction.

B. *Preliminary Injunction Standard.*

The general standards for a preliminary injunction are well-established. The court considers: (1) likelihood of success on merits; (2) possibility of irreparable harm to the moving party if the injunction is not granted; (3) the balance of hardships; and (4) in certain cases, whether the public interest will be advanced by granting preliminary relief. *See Miller v. California Pacific Medical Center*, 19 F.3d 449, 456 (9th Cir. 1994); *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987). The moving party must show "either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." *Miller*, 19 F.3d at 456 (quoting *Senate of California v. Mosbacher*, 968 F.2d 974, 977 (9th Cir. 1992)). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Odessa Union*, 833 F.2d at 174.

The standard is modified somewhat when the federal government seeks to enforce a statute:

> In statutory enforcement cases where the government has met the "probability of success prong" of the preliminary injunction test, we presume it has

> met the "possibility of irreparable injury" prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public. Therefore, further inquiry into irreparable injury is unnecessary. However, in statutory enforcement cases where the government can make only a "colorable evidentiary showing" of a violation, the court must consider the possibility of irreparable injury.

United States v. Nutri-cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992). Since this is an action by the federal government to enforce a statute, the injunction must be granted if the federal government establishes a probability of success on the merits since, in such cases, the possibility of irreparable harm is presumed.

Defendants argue that the Ninth Circuit has suggested that if the defendants do not concede a statutory violation, the presumption of irreparable harm does not apply. *See Miller*, 19 F.3d at 459 (noting that in *Odessa Union* "the traditional requirement of irreparable injury was inapplicable because the parties conceded that the federal statute involved was violated"). *Miller*, however, specifically held that the presumption applies if the defendant concedes the statutory violation *or* the government demonstrates "that it is likely to prevail on the merits." *Id.* at 460.

Defendants also contend that the presumption of irreparable harm, even if it may apply, is rebuttable. In *Miller* and *Nutri-cology*, however, the Ninth Circuit held that if the government establishes a likelihood of success on the merits, "further inquiry into irreparable harm is unnecessary." *Miller*, 19 F.3d at 459; *Nutri-*

cology, 982 F.2d at 398. Such a presumption is not unique to government statutory enforcement actions. In copyright actions, the party claiming infringement enjoys a similar presumption of irreparable harm upon a showing of likelihood of success on the merits. *See, e.g., Apple Computer v. Formula Int'l Inc.*, 725 F.2d 521, 525 (9th Cir. 1984).

Thus, before deciding whether the presumption of irreparable injury applies in these cases, the Court must determine if the federal government has established a probability of success on the merits, or only a colorable evidentiary showing, or neither.

C. ***Probability of Success on the Merits.***

Federal law prohibits the knowing or intentional manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance. *See* 21 U.S.C. § 841(a). It is undisputed that marijuana is a controlled substance within the meaning of § 841(a). It is equally undisputed that defendants distribute marijuana. Defendants do not challenge the federal government's evidence to the extent it establishes that defendants provide marijuana to seriously ill patients or their primary caregivers for personal use by the patient upon a physician's recommendation.

Defendants contend that the federal government has nonetheless not established a probability of success on the merits because it has not proved that federal law applies to defendants' conduct. In particular, defendants submit that (1) federal law applies only to illicit or illegal distribution of marijuana, and not to medical marijuana which is legal under state law; (2)

defendants are "joint users" and therefore cannot be guilty of "distribution"; and (3) defendants are exempt from the law as "ultimate users." Defendants argue alternatively that even if the law applies to their conduct, the common law defense of necessity justifies their conduct and, in any event, the statute as applied violates substantive due process.

1. Whether Federal Law Reaches Defendants' Conduct.

a. *Proposition 215 and Federal Law.*

Section 903 of the Controlled Substances Act provides that no provision of the Act

> shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Defendants argue that this section places the burden on the federal government to prove that state law, Health and Safety Code § 11362.5, is in positive conflict with federal law, 21 U.S.C. § 841(a), and that there is no way the two can stand together. The federal government cannot meet that burden, they contend, because "[i]t is unreasonable to believe that use of medical marijuana by this discrete population for this limited purpose [medical treatment] will create a significant drug problem." *Conant v. McCaffrey*, 172 F.R.D. 681, 694 n. 5 (N.D. Cal. 1997).

Defendants' argument misapprehends the scope of Proposition 215, federal law, and these lawsuits. Defendants are correct that Proposition 215 does not conflict with federal law, but not for the reasons advanced by defendants, i.e., that medical marijuana is not illegal. Proposition 215 does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws. Thus, whether defendants' conduct falls within the scope of Proposition 215 is immaterial. Defendants do not argue, as they cannot, that simply because state law does not prohibit their conduct federal law may not do so. *See United States v. Rosenberg*, 515 F.2d 190, 198 n. 14 (9th Cir. 1975).

Notwithstanding the operative language of Proposition 215, its declared purpose—"[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." ". . . and that such patients and their primary caregivers are not subject to criminal prosecution or sanction," Health & Safety Code § 11362.5(A) & (B)—suggests that California's voters want to exempt medical marijuana from prosecution under federal, as well as state law, even if that is not what they enacted. A state law which purports to legalize the distribution of marijuana for any purpose, however, even a laudable one, nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a). Section 841 prohibits the distribution of marijuana except for use in an approved research project. It does not exempt the distribution of marijuana to seriously ill persons for their personal medical use.

b. *Joint Users Defense.*

In *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), defendants, husband and wife, were charged with violating 21 U.S.C. § 841(a) by possessing cocaine with intent to distribute. *See id.* at 447. The Second Circuit held that "a statutory 'transfer' could not occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use." *United States v. Wright*, 593 F.2d 105, 107 (9th Cir. 1979) (discussing *Swiderski*). The court thus concluded that the trial judge erred by denying "the jury the opportunity to find that the defendants, who bought the drugs in each other's physical presence, intended merely to share the drugs" and thus, not to distribute them. *Id.*; *Swiderski*, 548 F.2d at 450.

Defendants contend that like the defendants in *Swiderski*, they have not violated the federal law prohibiting the distribution of marijuana. At a trial on the merits they submit that they will prove that their control of medical marijuana is established "through a cooperative enterprise, shared equally among all of the members thereto, for the exclusive medicinal use of each of them, individually" and that no third parties are involved and "nor is anyone else brought into a 'web' of drug use." They also contend that they "do not give money to others for the purposes of procuring drugs for recreational use," rather, they "act in concert as cooperatives to ensure the safe and affordable access to cannabis for medicinal purposes for each of the members." Defendants' Opposition Memorandum at 21. For purposes of the federal government's motion for preliminary injunction, the Court will assume that

defendants could produce evidence to support their offer of proof.

Swiderski, and the other cases cited by defendants, involved the question of whether the defendants in those actions were entitled to a "joint users" jury instruction. The issue here, however, is whether the federal government has established that it is likely to prevail at trial in establishing that *Swiderski* does not apply to defendants' conduct. The Court concludes that it has. *Swiderski* involved a simultaneous purchase by a husband and wife who testified they intended to use the controlled substance immediately. Applying *Swiderski* to a medical marijuana cooperative would extend *Swiderski* to a situation in which the controlled substance is not literally purchased simultaneously for immediate consumption. In light of the fact that *Swiderski* has never been so extended, and in light of the fact that it has not been adopted by the Ninth Circuit, the Court concludes that it is reasonably likely that such a defense would not prevail at a trial addressing whether injunctive relief should be granted.

The Court cautions, however, that it is not ruling that defendants are not entitled to such a defense at trial or in a contempt proceeding for violation of a preliminary or permanent injunction, or that defendants could not as a matter of law defeat a motion for summary judgment with evidence of mere possession. The Court's ruling is narrow. Based on defendants' offer of proof, which does not include any detailed factual allegations, the Court concludes that the federal government is likely to prevail at trial.

c. *Ultimate User Defense.*

Defendants contend that they have not violated the Controlled Substances Act because they are "ultimate users." An "ultimate user" is "a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household." 21 U.S.C. § 802(25). Defendants are not ultimate users because they have not lawfully obtained the marijuana at issue. As stated above, the fact that it may be lawful under state law for defendants to cultivate and possess marijuana for medical purposes, does not make it lawful under federal law—the only law at issue here. At present, the only way in which marijuana may be lawfully obtained is in a controlled research setting conducted pursuant to a FDA approved protocol, and where the researcher has been registered with the DEA. *See* 21 U.S.C. § 823(f); 21 C.F.R. § 1301.13(e).

2. The Medical Necessity Defense.

Defendants argue that even if the Controlled Substances Act prohibits their conduct, the injunction must nevertheless be denied because they are entitled to the common law defense of necessity. To invoke the defense, defendants must prove (1) that they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) that there were no legal alternatives to violating the law. *See United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989). Several state courts have recognized the applicability of the necessity defense in marijuana criminal

prosecutions. *See, e.g., State v. Hastings*, 118 Idaho 854, 801 P.2d 563 (1990); *State v. Diana*, 24 Wash. App. 908, 604 P.2d 1312 (1979); *State v. Bachman*, 61 Haw. 71, 595 P.2d 287 (1979).

Defendants submit that they can prove each element of the defense. First, their members will die, go blind, or suffer severe pain without cannabis; yet, obtaining cannabis "is, for many difficult or impossible to obtain." Thus, defendants contend, they are faced with two evils, letting their members die, go blind or suffer severe pain, or risk running afoul of federal law and that they have chosen the lesser evil. They can meet the second and third requirements, they argue, because the harm to be averted is imminent and life-threatening and supplying cannabis to their members is necessary to prevent that harm. Finally, they assert they have no reasonable alternative; for many people legal drugs simply do not work in treating their symptoms and they have no legal or safe alternative to obtaining marijuana.

The federal government responds that defendants do have a legal and reasonable alternative—a petition to reschedule marijuana from a Schedule I to a Schedule II controlled substance. *See* 21 U.S.C. § 811(a). Rescheduling to Schedule II would permit physicians to prescribe marijuana for therapeutic purposes. The Court doubts whether a rescheduling petition is a reasonable alternative for all seriously ill patients whose physicians have recommended marijuana for therapeutic purposes. For example, such a petition was filed in 1972 and did not receive a final ruling from the Administrator of the Drug Enforcement Agency until 1992, and a final decision on appeal until 1994. *See Alliance*

for Cannabis Therapeutics v. Drug Enforcement Administrator, 15 F.3d 1131 (D.C. Cir. 1994). Needless to say, it hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years if the patient requires marijuana to alleviate a current medical problem.

The Court, however, need not dispositively decide whether a reasonable alternative exists. The Court concludes that the federal government is likely to prevail at trial on its claim that the defense of necessity does not preclude the granting of the injunctive relief sought here. As the federal government points out, the defense of necessity has never been allowed to exempt a defendant from the criminal laws on a blanket basis. To put it another way, for the defense to be available here, defendants would have to prove that each and every patient to whom it provides cannabis is in danger of imminent harm; that the cannabis will alleviate the harm for that particular patient; and that the patient had no other alternatives, for example, that no other legal drug could have reasonably averted the harm. Defendants do not contend that they could offer such proof. For example, they state that they could offer evidence that "for many" people, legal drugs are not effective. That is not the same as saying that for each of every person to whom they provide, and will provide, marijuana, legal drugs are not effective such that marijuana is a necessity.

The Court is not ruling, however, that the defense of necessity is wholly inapplicable to these lawsuits. If a preliminary or permanent injunction is granted, and the federal government alleges that defendants have violated the injunction, there will be specific facts and

circumstances before the Court from which the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction. As such facts are not presently before the Court, it is premature for the Court to decide whether such a defense is available.

By concluding that medical necessity is not an appropriate defense to the issuance of an injunction, the Court is not placing defendants in the difficult position of deciding whether to go forward with their conduct, which they sincerely believe is absolutely necessary, or abiding by the injunction. As defendants point out, with or without the injunction they must decide whether to violate federal law; they are bound by federal law even in the absence of an injunction.

3. Substantive Due Process.

The Due Process Clause of the United States Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521U.S. 702, ——, 117 S. Ct. 2258, 2267, 138 L.Ed.2d 772 (1997). Where a "fundamental liberty interest" is involved, government action restricting that interest must be "narrowly tailored to serve a compelling [federal government] interest." *Id.* 117 S. Ct. at 2268; *see also id.* ("the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest'" (citation omitted)). A fundamental liberty interest must be " 'deeply rooted in this Nation's history and tradition,'" and " 'implicit in our concept of

ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* (citation omitted). The right must also be "carefully described." *Id.*

Defendants contend that the preliminary injunction should be denied because the relief sought—an order enjoining defendants from the manufacture or distribution, or possession with intent to distribute marijuana, or conspiring to do the same—violates their substantive due process rights. In particular, defendants assert that such an injunction would infringe their fundamental right to be free from unnecessary pain, to receive palliative treatment for a painful medical condition, to care for oneself, and to preserve one's own life. *See generally Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L.Ed.2d 772; *DeShaney v. Winnebago Cty. Dept. of Social Serv.*, 489 U.S. 189, 200, 109 S. Ct. 998, 103 L.Ed.2d 249 (1989). They argue that they are not asserting a constitutional right to the medical drug of their choice, even if the drug had not been proved effective, as was the case in the actions challenging federal government's restrictions on laetrile, *see, e.g., Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980); *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), but rather that they have a right to "a demonstrated and effective treatment as recommended by their physician that can alleviate their agony, preserve their sight, and save their lives." Defendants' Supplemental Opposition Memorandum at 9.

The Court concludes that the federal government is likely to prevail at trial on the issue of whether defendants have a fundamental right to medical marijuana. The Court, however, is not ruling as a matter of

law that no such right exists. It holds that on the record presently before the Court, defendants have not established that the right to such treatment is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Washington v. Glucksberg*, 521 U.S. at ——, 117 S. Ct. at 2268 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L.Ed. 288 (1937)). Nor have defendants established that they have standing to assert such a defense as to their distribution of marijuana to seriously ill persons other than themselves.

Moreover, the Court need not dispositively resolve this constitutional issue because even assuming defendants had established that such a fundamental right exists, and that they have standing to assert such a right, this defense, like the defense of necessity, is inapplicable to this injunction action. Defendants are asking the Court to deny the injunction and, in effect, exempt their conduct from the federal laws as a whole. In order for the Court to conclude that defendants have a substantive due process defense to an injunction barring them from violating federal law, the Court would have to find that the substantive due process right of each and every patient to whom the defendants will dispense marijuana in the future will be violated if the government prevents defendants from doing so. Such a defense may be available in a contempt proceeding where the trier of fact is presented with a particular transaction to a particular patient under a particular set of facts. *See Washington v. Glucksberg*, 521 U.S. at——n. 24, 117 S. Ct. at 2275 n. 24 (holding that Washington State's ban on assisted suicide is not unconstitutional as applied to terminally ill patients generally, but that the Court's decision does not "fore-

close the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge"). It is not available, however, to exempt generally the distribution of medical marijuana from the federal drug laws.

D. *Whether the Preliminary Injunction Should Be Granted.*

For the foregoing reasons, the Court concludes that the federal government has established that it is likely to prevail on the merits of its claim that defendants are in violation of federal law. As set forth above, in a statutory enforcement action brought by the federal government, irreparable harm is presumed if the government establishes that it is likely to prevail on the merits. *Nutri-cology*, 982 F.2d at 398 ("further inquiry into irreparable injury is unnecessary"); *see also id.* ("the passage of the statute is itself an implied finding by Congress that violations will harm the public").

Defendants argue that injunctive relief is nonetheless unwarranted because this Court is sitting as a court of equity and must therefore consider the traditional defenses to the granting of equitable relief, including the unclean hands of the moving party. They contend that these principles, plus the fact that the federal government is seeking injunctive relief at all, require the denial of injunctive relief.

1. The Propriety of Seeking Injunctive Relief.

The government rarely seeks injunctions pursuant to 21 U.S.C. § 882(a). The Court has located only five

published opinions in which the federal government sought relief based on the statute. *See, e.g., United States v. Leasehold Interest in 121 Nostrand Avenue*, 760 F. Supp. 1015, 1035 (E.D.N.Y. 1991); *United States v. Williams*, 416 F. Supp. 611, 614 (D.D.C. 1976). At oral argument, and in their supplemental memoranda, defendants insist that the federal government has chosen to bring a civil injunctive action rather than charge defendants with a violation of the criminal laws, in order to deprive defendants of the same right to a jury trial to which they would be entitled in a criminal action.

Defendants do not contend that the government is attempting to deprive them of a right to a jury in general. 21 U.S.C. § 882(b) provides that "[i]n case of an alleged violation of an injunction or restraining order issued under this section, trial shall, *upon demand of the accused*, be by a *jury* in accordance with the Federal Rules of Civil Procedure." 21 U.S.C. § 882(b) (emphasis added). If the Court issues an injunction, defendants have a right to a jury in any proceeding in which it is alleged that they have violated the injunction. Defendants instead contend that a jury trial in accordance with the Federal Rules of Civil Procedure will provide them with fewer procedural protections than a criminal trial. For example, in civil proceedings a party may make a motion for summary judgment; no such procedure, however, is available in a criminal trial; and in a civil proceeding, under Federal Rule of Civil Procedure 48, a jury may be composed of six persons, whereas in a criminal trial a defendant is guaranteed a trial by a jury of twelve.

These procedural differences do not compel a conclusion that the federal government is acting in bad faith. First, in any contempt proceeding, the Court will determine the appropriate number of jurors, up to twelve, which still must return a unanimous verdict. *See* Fed. R. Civ. P. 48 ("[u]nless the parties otherwise stipulate, (1) the verdict shall be unanimous"). Second, even assuming that the federal government could bring a motion for summary judgment in a contempt proceeding—and it is not clear from the plain language of section 882(b) that it could—summary judgment may be granted, and a party denied the fight to a jury, only if *no reasonable jury* could find for the nonmoving party. *See Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

a. Unclean Hands

The "clean hands" doctrine

> insists that one who seeks equity must come to the court without blemish. . . . This maxim "is a self-imposed ordinance that closes the doors of a court of equity to one tainted with an inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." . . . This rule applies to the government as well as to private litigants . . .

Equal Employment Opportunity Comm'n v. Recruit U.S.A., 939 F.2d 746, 752 (9th Cir. 1991) (citations omitted). Defendants contend that the federal government comes before this Court with unclean hands because it refuses to acknowledge that marijuana has a medical use and reschedule it as a Schedule II con-

trolled substance which would permit seriously ill patients to be treated with marijuana.

The federal government's conduct is "unclean," defendants assert, because the federal government itself has commissioned studies which have established marijuana's medical efficacy and then ignored these studies. Defendants highlight the fact that while the federal government continues to maintain that there are no medically accepted uses for marijuana, the DEA is simultaneously distributing marijuana to eight people under the Investigative New Drug program for medical purposes. Those eight people were enrolled years ago, defendants submit, before the "war on drugs," and the DEA has refused to enroll any more patients, not because of concerns as to the safety of marijuana, but for political reasons. Defendants also point out that in 1970, Congress appropriated a million dollars for a commission to recommend appropriate marijuana legislation. Public Law 91-513, § 601(e) (Oct. 27, 1970). The commission, known as the "Shafer Commission," recommended decriminalizing possession and casual distribution of small amounts of marijuana. *See Marihuana: A Signal of Misunderstanding; First Report of the National Commission on Marihuana and Drug Abuse*, 152 (1972). Congress, however, refused to reschedule marijuana. Finally, defendants argue that the DEA ignored the recommendation of its own Administrative Law Judge that marijuana be changed to a Schedule II controlled substance[.] *See* Defendants' Supplemental Opposition Memorandum at 23.

The federal government disputes that the Shafer Commission recommended decriminalizing marijuana. Rather, it contends the Commission merely recom-

mended increased support for studies to evaluate the efficacy of medical marijuana. *See First Report, supra,* at 176.

The fact remains, however, that medical marijuana advocates have been unsuccessful in convincing the federal government decision makers that marijuana should be reclassified as a Schedule II controlled substance and thus made available to seriously ill patients upon a physician's recommendation. That does not mean that the federal government has acted with unclean hands. Indeed, as late as 1994, a federal court of appeal affirmed the Drug Enforcement Agency Administrator's decision not to reschedule. *See Alliance for Cannabis Therapeutics v. Drug Enforcement Administration,* 15 F.3d 1131 (D.C. Cir. 1994).

The federal government has advised the Court that a petition for reclassification has been filed and that on December 17, 1997, the DEA referred the petition to the Secretary of Health and Human Services ("HHS") upon determining that the petition raised scientific and medical issues that had not previously been evaluated by HHS as part of any prior scheduling action. *See* Federal Government's Post-Hearing Memorandum at 13. One would expect the Secretary to act expeditiously on the petition in light of the expressed concerns of the citizens of California.

CONCLUSION

Because of the Supremacy Clause of the United States Constitution, the only issue before the Court is whether defendants' conduct violates federal law. The Court concludes that the federal government has

established that it is likely that it does. As these lawsuits are brought to enforce a statute, namely, the Controlled Substances Act, irreparable harm is presumed and the injunction must be granted.

Once again, however, the Court must caution as to what this decision does not do. The Court has not declared Proposition 215 unconstitutional. Nor has it enjoined the possession of marijuana by a seriously ill patient for the patient's personal medical use upon a physician's recommendation. Nor has the Court foreclosed the possibility of a medical necessity or constitutional defense in any proceeding in which it is alleged a defendant has violated the injunction issued herein.

Finally, the San Francisco District Attorney has raised the issue of possible local governmental distribution of medical marijuana. Such a question is not before the Court and, in any event, is purely speculative as it is uncertain whether the federal government would even seek to enjoin such conduct by a local government entity under strictly controlled conditions. For example, as the San Francisco District Attorney mentioned at oral argument, the distribution of clean needles to heroin addicts violates federal law, *see* 21 U.S.C. § 863, yet the federal government has not filed suit to enjoin the City and County of San Francisco's distribution of such needles. Indeed, HHS recently stated that community programs promoting the distribution of clean needles reduces the spread of AIDS and does not encourage drug use. *See* Health and Human Services Press Release, "*Research Shows Needle Exchange Programs Reduce HIV Infections Without Increasing Drug Use*" (April 20, 1998). From this publicly stated position, one could conclude that the

federal government will not enforce the drug paraphernalia statute in light of local community efforts to prevent the spread of AIDS. The Court recognizes that local governmental distribution of medical marijuana to seriously ill patients raises political issues which may not require judicial intervention.

Attached to this Memorandum and Order is a proposed form of preliminary injunction in 98-00085. The injunction in each case will be identical except for the name of the defendants and the location of the dispensary. The parties are directed to file a written submission with this Court by 5:00 p.m. on Monday, May 18, 1998 as to the form of the order. The Court will issue the preliminary injunction shortly thereafter.

IT IS SO ORDERED.

[PROPOSED] ORDER

For the reasons stated in its Memorandum and Order dated May 13, 1998, is hereby ORDERED as follows:

1. Defendants Cannabis Cultivators Club and Dennis Peron are hereby preliminarily enjoined, pending further order of the Court, from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1); and

2. Defendants Cannabis Cultivators Club and Dennis Peron are hereby preliminarily enjoined from using the premises of 1444 Market Street, San

Francisco, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Dennis Peron is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana.

4. It shall not be a violation of this injunction for defendant Dennis Peron to seek and obtain legal advice from his attorneys.

IT IS SO ORDERED.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16950, 98-17044, 98-17137
D.C. No. (C98-00088-CRB (Northern California))

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE;
JEFFREY JONES, DEFENDANTS-APPELLANTS

[Filed: Feb. 29, 2000]

ORDER

Before: SCHROEDER, REINHARDT, and SILVERMAN, Circuit Judges.

The panel as constituted above has voted to deny the Petition for Rehearing and to deny the Petition for Rehearing En Banc.

The full court was advised of the petition for rehearing en banc and no judge of the court has requested to vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX I

1. Section 811 of Title 21 of the United States Code states in relevant part as follows:

Authority and criteria for classification of substances

(a) Rules and regulations of Attorney General; hearing

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5. Proceedings for the issuance, amendment, or repeal of such

rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(b) Evaluation of drugs and other substances

The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance

should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

(c) Factors determinative of control or removal from schedules

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

* * * * *

2. Section 812(b)(1) of Title 21 of the United States Code states as follows:

(b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

3. Section 823(f) of Title 21 of the United States Code states as follows:

(f) Research by practitioners; pharmacies; research applications; construction of Article 7 of the Convention on Psychotropic Substances

The Attorney General shall register practitioners (including pharmacies, as distinguished from pharmacists) to dispense, or conduct research with, controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense, or conduct research with respect to, controlled substances under the laws of the State in which he practices. The Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Separate registration under this part for practitioners engaging in research with controlled substances in schedule II, III, IV, or V, who are already registered under this part in another capacity, shall not be required. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 824(a) of this title. Article 7 of the Convention on Psychotropic Substances shall not be construed to prohibit, or impose additional restrictions upon, research involving drugs or other substances scheduled under the convention which is conducted in conformity with this subsection and other applicable provisions of this subchapter.

4. Section 841(a) of Title 21 of the United States Code states as follows:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

5. Section 882(a) of Title 21 of the United States Code states as follows:

Injunctions

(a) Jurisdiction

The district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this subchapter.

5. Pub. L. 105-277, Div. F, 112 Stat. 2681, 760-761, 105th Cong., 2d Sess., (1998) states as follows:

DIVISION F—NOT LEGALIZING MARIJUANA FOR MEDICINAL USE

It is the sense of the Congress that–

(1) certain drugs are listed on Schedule I of the Controlled Substances Act if they have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision;

(2) the consequences of illegal use of Schedule I drugs are well documented, particularly with regard to physical health, highway safety, and criminal activity;

(3) pursuant to section 401 of the Controlled Substances Act, it is illegal to manufacture, distribute, or dispense marijuana, heroin, LSD, and more than 100 other Schedule I drugs;

(4) pursuant to section 505 of the Federal Food, Drug and Cosmetic Act, before any drug can be approved as a medication in the United States, it must meet extensive scientific and medical standards established by the Food and Drug Administration to ensure it is safe and effective;

(5) marijuana and other Schedule I drugs have not been approved by the Food and Drug Administration to treat any disease or condition;

(6) the Federal Food, Drug and Cosmetic Act already prohibits the sale of any unapproved drug, including marijuana, that has not been proven safe and effective for medical purposes and grants the Food and Drug Administration the authority to enforce this prohibition through seizure and other civil action, as well as through criminal penalties;

(7) marijuana use by children in grades 8 through 12 declined steadily from 1980 to 1992, but, from 1992 to 1996, has dramatically increased by 253 percent among 8th graders, 151 percent among 10th graders, and 84 percent among 12th graders, and the average age of first-time use of marijuana is now younger than it has ever been;

(8) according to the 1997 survey by the Center on Addition and Substance Abuse at Columbia University, 500,000 8th graders began using marijuana in the 6th and 7th grades;

(9) according to that same 1997 survey, youths between the ages of 12 and 17 who use marijuana are 85 times more likely to use cocaine than those who abstain from marijuana, and 60 percent of adolescents who use marijuana before the age of 15 will later use cocaine; and

(10) the rate of illegal drug use among youth is linked to their perceptions of the health and safety risks of those drugs, and the ambiguous cultural messages about marijuana use are contributing to a growing acceptance of marijuana use among children and teenagers;

(11) Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration; and

(12) not later than 90 days after the date of the enactment of this Act–

(A) the Attorney General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report on–

(i) the total quantity of marijuana eradicated in the United States during the period from 1992 through 1997; and

(ii) the annual number of arrests and prosecutions for Federal marijuana offenses during the period described in clause (i); and

(B) the Commissioner of Foods and Drugs shall submit to the Committee on Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate a report on the specific efforts underway to enforce sections 304 and 505 of the Federal Food, Drug and Cosmetic Act with respect to marijuana and other Schedule I drugs.